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WONG CHEE KHEONG v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
MD RAUS SHARIF PCA
HAMID SULTAN ABU BACKER JCA
IDRUS HARUN JCA

B

[CRIMINAL APPEALS NO: W-09-80-04-2014, 09-110-04-2014, 09-86-04-2014 & 09-104-04-2014]
9 MARCH 2016

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SECURITIES: *Shares – Trading account – Offences under s. 84(3) read with s. 88B of Security Industry Act 1983 – Whether transactions executed in accounts were genuine demand to invest shares – Whether there was change in beneficial ownership of shares transacted – Whether common intention established – Whether knowledge proven*

D

CRIMINAL LAW: *Penal Code – Section 34 – Offences under s. 84(3) read with s. 88B of Security Industry Act 1983 – Elements of offences – Whether established – Whether there was change in beneficial ownership of shares transacted – Whether common intention to commit offence established – Whether knowledge proven – Whether common intention under s. 34 of Penal Code applicable to offences outside Penal Code*

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CRIMINAL PROCEDURE: *Sentence – Appeal against sentence – Offences under s. 84(3) read with s. 88B of Security Industry Act 1983 – Reduction of sentence by High Court Judge – Sentence of three months by Sessions Court Judge reduced to one day – Whether commensurate with offence and role played by offender – Whether reflected gravity of offence – Whether sentence manifestly inadequate*

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The first and second appellants were jointly charged before the Sessions Court on an amended principal charge and an amended alternative charge for an offence under s. 84(1) of the Security Industry Act 1983 ('SIA') read together with s. 34 of the Penal Code and punishable under s. 88B of the SIA. Suremax Group Berhad ('Suremax') was a construction company listed on the Main Board of Bursa Malaysia. The appellants were the directors of Impetus Development Sdn Bhd, Impetus Marketing Sdn Bhd and Impetus Unity Sdn Bhd. The appellants, together with one Ng Chong Yeng ('PW1') had procured 153 accounts including the nine accounts, listed in the appendix to the charge against the appellants, in 15 stockbroking firms to be opened under various individuals, including their families, friends and acquaintances to enable sales and purchases (trades) to be executed for the Suremax shares. There was in effect no change in beneficial ownership, indicating the pattern of trade in the said accounts and between the said accounts was to buy and sell from each other which involved the appellants and PW1. Conclusive evidence showed that the first appellant played the main and major role as he had monitored the share price and dictated the price and quantity to buy and sell Suremax shares and the manner of the

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trade. The role of the second appellant was to procure further additional accounts in the whole scheme of things and had assisted the first appellant in conveying orders to trade as dictated by the first appellant, including his own account. Through these activities, between 24 November 2004 and 22 March 2005, Suremax shares were actively traded in a total of 153 accounts opened with 15 stockbroking firms including the said nine accounts. The volume of the shares traded was rising abnormally throughout the material period against the volume of the stock market which was declining. All of the accounts dominated transactions of buy and sell to a very large degree. Only a small percentage of the total transactions were conducted among outsiders with accounts other than the 153 accounts. It was undisputed evidence that the price of Suremax shares plunged when the said nine accounts and other accounts in question ceased to trade abruptly on 22 March 2005. The Sessions Court Judge ('SCJ'), at the close of case for the prosecution, ruled that the prosecution had failed to prove a *prima facie* case against both the appellants on the principal amended charge. However, she held that a *prima facie* case on the amended alternative charge had been established by the prosecution against both appellants and accordingly called upon them to enter on their defence. At the end of the defence case, the SCJ convicted the appellants on the amended alternative charge and sentenced the first appellant to a term of imprisonment of 24 months and a fine of RM3 million in default six months imprisonment while the second appellant was sentenced to a term of imprisonment of three months and a fine of RM2 million in default six months imprisonment. Both the appellants appealed to the High Court against their respective conviction and sentence. The appeal of the first appellant was dismissed. However, as regards to the second appellant, while the appeal against his conviction was dismissed, his appeal against sentence was allowed in part when the High Court Judge ('HCJ') reduced the sentence of imprisonment from three months to one day. Hence, the appeals, *inter alia*: (i) by the first appellant against the sentence; (ii) by the second appellant against his conviction; and (iii) by the prosecution against the sentenced imposed on the second appellant. The grounds of appeal raised by the appellants were confined exclusively to the issues of: (i) the admissibility of PW1's and PW38's evidence; (ii) Suremax's listing on Bursa Malaysia; (iii) the application of s. 34 of the Penal Code to s. 84(1) of the SIA; (iv) reasonable doubt on the existence of common intention; (v) the presumption under s. 84(3)(a); and (vi) corroboration of accomplice evidence against the second appellant.

Held (dismissing appellants' appeal and affirming convictions of both appellants; allowing prosecutions' appeal against sentence in part)
Per Idrus Harun JCA delivering the judgment of the court:

(1) The transactions executed in all the accounts including the said nine accounts were not genuine demand to invest in Suremax shares in that there was, in effect, no change in beneficial ownership. The fact that the

A appellants had used their accounts and also those of their companies, employees, family and friends were clearly indicative of their knowledge that their trades did not involve any change in the beneficial ownership of the shares transacted. The evidence clearly showed the existence of common intention of both appellants and PW1 to commit
B the offence under s. 84(3)(a) read with s. 88B of the SIA. Hence, the SCJ was correct in holding that all the ingredients of the offence had been established and thus triggered the deeming provisions in s. 84(3) of the SIA and finding that the prosecution had established a *prima facie* case on the alternative charge against the appellants. (para 14)

C **(2)** PW1 was held to be an accomplice and the findings of guilt of the appellants did not rest on PW1's testimony. Therefore, the question of whether the first appellant was given a fair trial or was prejudiced did not arise. Further, the first and second appellants had ample opportunity to cross-examine and challenge the prosecution's witnesses and the
D liberty to put forward his defence by adducing other independent evidence to support his case. However, they had failed to do so. All the ingredients of the offence against the first and second appellants were proven beyond reasonable doubt. The *actus reus* and *mens rea* of both appellants together with the deeming provisions under s. 84(3) upon
E which they had failed to invoke the statutory defence to rebut it clearly showed that the conviction was safe. (para 24)

(3) There was ample unchallenged evidence that showed Suremax was a public listed construction company listed on the Main Board of Bursa Malaysia and its shares were traded thereon. The appellants' conduct in
F trading in Suremax shares patently showed that they were consciously aware that Suremax was a listed entity on the Malaysia stock exchange. The fact of Suremax's listing on Bursa Malaysia was sufficiently notorious as to make it proper for the court to assume its existence without proof. (paras 28, 30, 31 & 33)

G **(4)** Expert opinions have high probative value. An expert witness has the necessary experience in arriving at and justifying his opinion in his specialised field and his opinion can readily be tested against the known facts and the opinion of another expert called by the opposing party. PW38 relied on the order and match reports in order to prove the
H offence under the alternative charge. These documents were not challenged by the appellants and neither had they called their own expert witness to contest the findings of PW38. PW38's evidence showed active trading of Suremax shares and the value of his expert opinion could never be doubted. In the circumstances, the SCJ was
I correct in admitting PW38's evidence in respect of the alternative charge. (paras 39-41)

(5) The provisions of common intention under s. 34 of the Penal Code, which describes the principle of joint liability in the commission of criminal acts, can be applied to any criminal case when the facts so warrant. Section 34 does not create an offence but provides for a rule of evidence describing joint criminal liability. Thus, s. 40 of the Penal Code is not applicable to this case and the appellant's contention that common intention under s. 34 of the Penal Code only applies to offences in the said Code was therefore fallacious. Section 34, when it speaks of criminal act carried out by several persons in furtherance of common intention of all, has regard not to the offence as a whole, but to the criminal acts, which result in the offence. Hence, common intention under s. 34 of the Penal Code applies, not only to offences under the Penal Code, but also to other offences outside the Penal Code. (paras 42-44)

(6) Whilst s. 107B(1) of the Companies Act deals with the opening of accounts and obligations that come with it, s. 84(3) of the SIA specifically deals with facts in a criminal prosecution where it is proven that the trades did not involve any change in the beneficial ownership of the shares. Although s. 84(3) of the SIA came into force earlier than s. 107B(1) of the Companies Act, the said law deals specifically with the market misconduct. The evidence proved that both the appellants had committed the crime and therefore, s. 84(3) of the SIA should come into operation. Even without the operation of the deeming provisions of s. 84(3), the prosecution had proven the *mens rea* of both the appellants. Therefore, both the appellants being the true perpetrators in committing the crime, and not the account holders, could not use or argue that s. 107B(1) of the Companies Act 1965 ('the Companies Act') protected them from any liability. (paras 47 & 48)

(7) The said nine accounts on all those numerous occasions had bought and sold the same Suremax shares in its respective accounts. Therefore, it fell squarely within the provision of s. 84(5) of the SIA. The trades conducted in the nine accounts during the material period did not involve any change in the beneficial ownership of the Suremax shares, resulting in s. 84(3) SIA comes into operation. (para 49)

(8) Exhibits P176 and P178 are conclusive data captured by the stock exchange of transactions in Suremax shares executed in all the accounts including the said nine accounts for the material period. There was no challenge whatsoever on this evidence during the trial, which in effect, tantamount to the acceptance of the facts it carried. Therefore, any contention of unreliability or prejudice by the second appellant must be rejected. Further, it was a correct finding of fact that the second appellant together with the first appellant and PW1 had committed the offence by controlling and executing the trades in the nine accounts. It would follow therefore that upon proof that the trades in question did

not involve any change in the beneficial ownership of the Suremax shares, the presumption under s. 84(3)(a) of the SIA would apply to the second appellant in as much as it applied to the first appellant. It would be manifestly incorrect to invoke the presumption only against the first appellant. (paras 50 & 51)

(9) The second appellant's attempt to stretch the definition of accomplice to the account holders, remisiers and employees of the appellants could not be allowed. They are independent, credible witnesses whose testimonies were rightfully given due weight for a finding of both the appellants' culpability and involvement. The essential elements of the offence under s. 84(1) and (3)(a) of the SIA read with s. 34 of the Penal Code had been established beyond reasonable doubt and on the contrary the defence had failed to rebut the statutory presumption in s. 84(3). (paras 56 & 60)

(10) The SCJ had applied correct principles and considered all relevant evidence and sentencing factors required by law in imposing the sentences on the first and second appellants. However, the imprisonment sentence meted out against the second appellant had been reduced from three months to only one day by the HCJ. In doing so, the HCJ had erred as the reduction did not commensurate with the offence and the role played by the second appellant. It clearly portrayed inconsistency of the sentences imposed on both appellants in the same case. The sentence was manifestly inadequate and was not reflective of the gravity of offence committed by the second appellant. Therefore, the sentence meted out by the High Court on the second appellant was set aside and the sentence imposed by the Sessions Court was reinstated. The sentence imposed on the first appellant was affirmed. (paras 63, 66 & 70)

Bahasa Malaysia *Headnotes*

Perayu pertama dan kedua dipertuduh bersama-sama di Mahkamah Sesyen atas pertuduhan utama terpinda dan pertuduhan alternatif terpinda bagi kesalahan di bawah s. 84 Akta Industri Sekuriti 1983 ('Akta') dibaca bersama-sama dengan s. 34 Kanun Keseksaan dan boleh dihukum di bawah s. 88B Akta. Suremax Group Bhd ('Suremax') adalah syarikat pembinaan yang disenaraikan di Papan Utama Bursa Malaysia. Perayu-perayu adalah pengarah Impetus Development Sdn Bhd, Impetus Marketing Sdn Bhd dan Impetus Unity Sdn Bhd. Perayu-perayu bersama-sama dengan seorang bernama Ng Chong Yeng ('PW1') memperoleh 153 akaun termasuk sembilan akaun, yang disenaraikan dalam apendiks kepada pertuduhan terhadap perayu-perayu, dalam 15 firma broker saham dibuka di bawah pelbagai individu, termasuk keluarga, rakan-rakan dan kenalan mereka untuk membolehkan jual beli (dagangan) dibuat bagi saham-saham Suremax. Sebenarnya, tiada perubahan dalam milikan benefisial yang menunjukkan bentuk dagangan dalam akaun-akaun tersebut dan di antara akaun-akaun

tersebut adalah untuk membeli dan menjual sesama sendiri melibatkan perayu-perayu dan PW1. Keterangan kukuh menunjukkan bahawa perayu pertama memainkan peranan utama dan besar kerana dia mengawasi harga saham dan menentukan harga dan kuantiti untuk membeli dan menjual saham-saham Suremax dan cara dagangan. Peranan perayu kedua adalah untuk memperoleh akaun-akaun tambahan dalam urusan skema tersebut dan membantu perayu pertama menyalurkan arahan untuk dagangan seperti yang ditetapkan oleh perayu pertama, termasuk akaunnya sendiri. Melalui aktiviti-aktiviti ini, antara 24 November 2004 dan 22 Mac 2005, saham-saham Suremax didagangkan secara aktif dalam sejumlah 153 akaun yang dibuka dengan 15 firma broker saham termasuk sembilan akaun tersebut. Jumlah saham-saham yang didagangkan melonjak secara tidak normal sepanjang tempoh material terhadap jumlah pasaran saham yang menurun. Kesemua akaun tersebut menguasai transaksi jual beli pada tahap yang tinggi. Hanya peratusan kecil daripada jumlah keseluruhan transaksi dijalankan antara orang luar dengan akaun-akaun selain daripada 153 akaun tersebut. Keterangan tidak dipertikaikan bahawa harga saham Suremax jatuh apabila sembilan akaun tersebut dan akaun-akaun lain yang dipersoalkan menghentikan dagangan secara tiba-tiba pada 22 Mac 2005. Hakim Mahkamah Sesyen ('HMS'), di akhir kes pendakwaan, memutuskan bahawa pihak pendakwaan gagal membuktikan kes *prima facie* terhadap kedua-dua perayu atas pertuduhan terpinda utama. Walau bagaimanapun, beliau memutuskan bahawa kes *prima facie* atas pertuduhan terpinda alternatif telah dibuktikan oleh pihak pendakwaan terhadap kedua-dua perayu dan dengan itu, mengarahkan mereka membela diri. Di akhir kes pembelaan, HMS mensabitkan perayu-perayu atas pertuduhan terpinda alternatif dan menjatuhkan hukuman penjara 24 bulan dan denda RM3 juta, jika gagal membayar enam bulan penjara, terhadap perayu pertama sementara perayu kedua dijatuhkan hukuman penjara tiga bulan dan denda RM2 juta, jika gagal membayar enam bulan penjara. Kedua-dua perayu merayu ke Mahkamah Tinggi terhadap sabitan dan hukuman masing-masing. Rayuan perayu pertama ditolak. Walau bagaimanapun, berkaitan perayu kedua, sementara rayuan terhadap sabitannya ditolak, rayuannya terhadap hukuman dibenarkan sebahagian di mana Hakim Mahkamah Tinggi ('HMT') mengurangkan hukuman penjara daripada tiga bulan kepada sehari. Oleh itu, rayuan-rayuan, antara lain: (i) oleh perayu pertama terhadap hukuman; (ii) oleh perayu kedua terhadap sabitannya; dan (iii) oleh pihak pendakwaan terhadap hukuman yang dikenakan kepada kedua-dua perayu. Alasan-alasan rayuan yang dibangkitkan oleh perayu-perayu adalah terhad secara eksklusif kepada isu-isu (i) kebolehterimaan keterangan PW1 dan PW38; (ii) penyenaraian Suremax di Bursa Malaysia; (iii) pemakaian s. 34 Kanun Keseksaan kepada s. 83(1) Akta; (iv) keraguan munasabah atas kewujudan niat bersama; (v) anggapan di bawah s. 84(3); dan (vi) keterangan sokongan bagi keterangan rakan subahat terhadap perayu kedua.

Diputuskan (menolak rayuan perayu-perayu dan mengesahkan sabitan kedua-dua perayu; membenarkan rayuan pihak pendakwaan terhadap sebahagian hukuman)

Per Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Transaksi yang dilaksanakan dalam semua akaun termasuk sembilan akaun tersebut bukan permintaan secara jujur untuk melabur dalam saham-saham Suremax di mana, sebenarnya, tiada perubahan dalam pemilikan benefisial. Fakta bahawa perayu-perayu menggunakan akaun mereka dan juga syarikat-syarikat, pekerja-pekerja, keluarga dan rakan-rakan mereka jelas menunjukkan pengetahuan mereka bahawa dagangan mereka tidak melibatkan apa-apa perubahan dalam pemilikan benefisial saham yang ditransaksikan. Keterangan jelas menunjukkan kewujudan niat bersama kedua-dua perayu dan PW1 untuk melakukan kesalahan di bawah s. 84(3)(a) dibaca bersama dengan s. 88B Akta. Oleh itu, HMS betul dalam memutuskan bahawa kesemua intipati kesalahan dibuktikan dan, dengan itu, mencetuskan peruntukan dalam s. 84(3) Akta dan dapatan bahawa pihak pendakwaan berjaya membuktikan kes *prima facie* bagi pertuduhan alternatif terhadap perayu-perayu.

(2) PW1 diputuskan sebagai rakan sejenayah dan dapatan kesalahan perayu-perayu tidak bergantung kepada testimoni PW1. Oleh itu, persoalan sama ada perayu pertama diberi perbicaraan adil atau berprasangka tidak timbul. Selanjutnya, perayu pertama dan kedua mempunyai peluang memadai untuk memeriksa balas dan mencabar saksi-saksi pendakwaan dan kebebasan untuk mengutarakan pembelaannya dengan mengemukakan keterangan bebas lain bagi menyokong kesnya. Walau bagaimanapun, mereka gagal berbuat demikian. Kesemua intipati kesalahan terhadap perayu pertama dan kedua dibuktikan melampaui keraguan munasabah. *Actus reus* dan *mens rea* kedua-dua perayu berserta dengan peruntukan beranggapan di bawah s. 84(3) yang gagal dipatahkan oleh mereka dengan membangkitkan pembelaan statutori jelas menunjukkan bahawa sabitan adalah selamat.

(3) Terdapat keterangan tidak dicabar yang mencukupi untuk menunjukkan Suremax adalah sebuah syarikat pembinaan tersenarai awam yang disenaraikan di Papan Utama Bursa Malaysia dan sahamnya diperdagangkan. Tindakan perayu-perayu dalam dagangan saham Suremax nyata menunjukkan bahawa mereka sedar Suremax adalah entiti yang tersenarai di Bursa Saham Malaysia. Fakta penyenaraian Suremax di Bursa Malaysia adalah fakta cukup diketahui bagi mewajarkan mahkamah menganggap kewujudannya tanpa bukti.

(4) Pendapat pakar bernilai probatif tinggi. Saksi pakar mempunyai pengalaman yang diperlukan dalam mencapai dan mewajarkan pandangannya dalam bidang khusus dan pandangannya sedia diuji terhadap fakta yang diketahui dan pandangan pakar lain yang dipanggil oleh pihak lawan. PW38 bergantung pada laporan perintah dan

pertandingan bagi membuktikan kesalahan di bawah pertuduhan alternatif. Dokumen ini tidak dicabar oleh perayu-perayu dan mereka tidak memanggil saksi pakar mereka sendiri untuk menyangkal dapatan PW38. Keterangan PW38 menunjukkan dagangan aktif saham-saham Suremax dan nilai pendapat pakarnya tidak boleh diragui. Dalam hal keadaan ini, HMS betul dalam mengakui keterangan PW38 berkenaan pertuduhan alternatif.

(5) Peruntukan niat bersama di bawah s. 34 Kanun Keseksaan yang menggambarkan prinsip liabiliti bersama dalam melakukan perbuatan jenayah boleh digunakan ke atas mana-mana kes jenayah apabila fakta menghendakinya berbuat sedemikian. Seksyen 34 tidak mewujudkan kesalahan tetapi memperuntukkan kaedah keterangan yang menggambarkan liabiliti jenayah bersama. Maka, s. 40 Kanun Keseksaan tidak terpakai dalam kes ini dan hujahan perayu bahawa niat bersama di bawah s. 34 Kanun Keseksaan hanya terpakai kepada kesalahan dalam Kanun dengan itu adalah salah sama sekali. Seksyen 34, apabila ia berkaitan dengan perbuatan jenayah yang dilakukan oleh beberapa orang untuk melanjutkan niat bersama, mempunyai anggapan, bukan terhadap kesalahan pada keseluruhannya, tetapi kepada perbuatan jenayah, yang menjurus kepada kesalahan. Oleh itu, niat bersama di bawah s. 34 Kanun Keseksaan terpakai bukan sahaja bagi kesalahan-kesalahan di bawah Kanun Keseksaan tetapi juga kepada kesalahan-kesalahan lain di luar Kanun Keseksaan.

(6) Walaupun s. 107B (1) Akta Syarikat berkaitan dengan pembukaan akaun dan tanggungjawab yang berbangkit bersama-samanya, s. 84(3) Akta secara khusus berkaitan dengan fakta dalam suatu pendakwaan jenayah di mana terbukti bahawa perdagangan tidak melibatkan apa-apa perubahan dalam pemilikan benefisial saham. Walaupun s. 84(3) Akta berkuat kuasa lebih awal berbanding s. 107B(1) Akta Syarikat, undang-undang tersebut menangani khususnya salah laku pasaran. Keterangan membuktikan bahawa kedua-dua perayu telah melakukan jenayah tersebut dan oleh itu, s. 84(3) Akta perlu berkuat kuasa. Walaupun tanpa penguatkuasaan peruntukan s. 84(3) tersebut, pendakwaan berjaya membuktikan *mens rea* bagi kedua-dua perayu. Oleh itu, kedua-dua perayu adalah pelaku sebenar jenayah, dan bukan pemegang akaun, tidak boleh menggunakan atau menghujahkan bahawa s. 107B(1) Akta Syarikat 1965 ('Akta Syarikat') melindungi mereka daripada sebarang liabiliti.

(7) Sembilan akaun berkenaan dalam kesemua urusniaga tersebut telah membeli dan menjual saham Suremax yang sama dalam akaun masing-masing. Oleh itu, ia termaktub dalam peruntukan s. 84(5) Akta. Dagangan yang dikendalikan dalam sembilan akaun dalam tempoh material tidak melibatkan apa-apa perubahan dalam pemilikan benefisial saham Suremax, menyebabkan s. 84(3) Akta mula berkuat kuasa.

(8) Ekshibit P176 dan P178 adalah data muktamad diperolehi oleh bursa saham bagi transaksi dalam saham Suremax yang dilaksanakan dalam semua akaun termasuk sembilan akaun berkenaan dalam tempoh material. Tiada cabaran dalam keterangan ini semasa perbicaraan yang, pada hakikatnya, menunjukkan penerimaan faktanya. Oleh itu, apa-apa hujahan mengenai ketidakbolehpercayaan atau prejudis oleh perayu kedua harus ditolak. Selanjutnya, adalah suatu dapatan fakta yang betul bahawa perayu kedua bersama-sama dengan perayu pertama dan PW1 telah melakukan kesalahan tersebut dengan mengawal dan menjalankan urusniaga dalam sembilan akaun tersebut. Oleh itu, dengan pembuktian bahawa dagangan yang dipersoalkan tidak melibatkan apa-apa perubahan dalam pemilikan benefisial saham Suremax, anggapan di bawah s. 84(3)(a) Akta akan diguna pakai kepada perayu kedua sepertimana yang digunakan ke atas perayu pertama. Adalah jelas tidak betul untuk mengguna pakai anggapan terhadap perayu pertama sahaja.

(9) Percubaan perayu kedua untuk meregangkan definisi rakan sejenayah kepada pemegang akaun, remiser dan pekerja perayu tidak boleh dibenarkan. Mereka adalah saksi yang boleh dipercayai dan bebas yang mana testimoni mereka berhak diberikan pertimbangan sewajarnya untuk dapatan kedua-dua kebersalahan dan penglibatan perayu-perayu. Unsur-unsur penting kesalahan di bawah s. 84(1) dan (3)(a) Akta yang dibaca bersama s. 34 Kanun Keseksaan dibuktikan melampaui keraguan munasabah dan sebaliknya pihak pembelaan gagal menyangkal anggapan statutori dalam s. 84(3).

(10) HMS telah mengguna pakai prinsip yang betul dan mengambil kira kesemua faktor keterangan dan hukuman yang diperlukan oleh undang-undang dalam menjatuhkan hukuman ke atas perayu pertama dan kedua. Walau bagaimanapun, hukuman penjara yang dikenakan terhadap perayu kedua dikurangkan daripada tiga bulan kepada hanya satu hari oleh HMT. Dengan berbuat demikian, HMT terkhilaf kerana pengurangan tersebut tidak setimpal dengan kesalahan dan peranan yang dimainkan oleh perayu kedua. Ia jelas menggambarkan ketidakseimbangan hukuman yang dikenakan ke atas kedua-dua perayu dalam kes yang sama. Hukuman nyata tidak memadai dan tidak mencerminkan graviti kesalahan yang dilakukan oleh perayu kedua. Oleh itu, hukuman yang dijatuhkan oleh Mahkamah Tinggi ke atas perayu kedua diketepikan dan hukuman yang dikenakan oleh Mahkamah Sesyen dikembalikan. Hukuman yang dikenakan ke atas perayu pertama disahkan.

Case(s) referred to:

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Azlan Alias v. PP [2009] 1 LNS 534 CA ***(refd)***
Barendra Kumar Ghosh v. Emperor AIR 1925 PC 1 ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Ismail Mansor & Anor v. PP [2014] 1 LNS 1413 CA ***(refd)***
Johnson Tan Han Seng v. PP & Oher Appeals [1977] 1 LNS 38 FC ***(refd)***

Koo Wing Cheung & Anor v. PP [2014] 1 CLJ 46 CA ***(refd)***
Krishna Rao Gurumurthi v. PP And Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
Lai Kum Leng & Satu Lagi lwn. PP [2013] 1 LNS 529 HC ***(refd)***
Lee Chow Meng v. PP [1975] 1 LNS 199 ***(refd)***
Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA ***(refd)***
Lim Guan Eng v. PP [2000] 2 CLJ 541 FC ***(refd)***
Mohd Sahir Awang & Satu Lagi lwn. PP [2014] 1 LNS 969 CA ***(refd)***
Muhammad lsa Aris & Ors v. PP [2011] 3 CLJ 510 CA ***(refd)***
Murugan Muniandy v. PP [2014] 11 MLJ 161 ***(refd)***
Nathan v. PP [1972] 1 LNS 99 HC ***(refd)***
Ng Kok Lian & Anor v. PP [1983] 2 CLJ 247; [1983] CLJ (Rep) 293 FC ***(refd)***
Pasupathy Kanagasaby v. PP [2005] 1 CLJ 442 CA ***(refd)***
Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1985] 1 LNS 122 SC ***(refd)***
PP v. Chu Beow Hin [1982] 1 MLJ 135 ***(foll)***
PP v. Karthiselvam Vengatan [2009] 4 CLJ 632 CA ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 ***(refd)***
PP v. Loo Chang Hock [1988] 1 CLJ 76 HC ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 170 SC ***(refd)***
Re Lin Securities (Pte) Peter Chi Man Kwong & 2 Ors v. Asia Commercial Bank & 20 Ors [1988] 1 LNS 159 HC ***(refd)***
Samundee Devan Kerishnan Muthu v. PP [2009] 1 CLJ 498 CA ***(refd)***
Securities and Futures Commission v. Choi Wai Zak & Anor [2003] 1 HKC 30 ***(refd)***
Sia Soon Suan v. PP [1965] 1 LNS 165 FC ***(refd)***
Tan Hung Thiam And Another v. Public Prosecutor [1991] 1 SLR (R) 689 ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 107B(1), 107D(1)
Criminal Procedure Code, s. 182A
Evidence Act 1950, ss. 57, 90A
Penal Code, ss. 34, 40
Securities Industry Act 1983, ss. 84(1), (3)(a), (4), (5), 88B

Other source(s) referred to:
Ratanlal and Dhirajlal's Law of Crimes, 26th edn, pp 85, 121

For the 1st appellant - Gobind Singh Deo & Mohd Haijan Omar; M/s Gobind Singh Deo & Co
For the 2nd appellant - Kamarul Hisham Kamaruddin & Ling Yee Siew; M/s The Chambers of Kamarul Hisham & Hasnal Rezua
For the respondent - Roz Mawar Rozain, Zul'Aida Zulkipli & Munira Masood; AG's Chambers

[Editor's note: For the Court of Appeal judgment, please see Wong Chee Kheong lwn. PP [2014] 1 LNS 460 (affirmed).]

Reported by S Barathi

A

JUDGMENT

Idrus Harun JCA:

Introduction

[1] The first and second appellants namely Wong Chee Kheong and Bun
B Lit Chun were jointly charged before the Sessions Court as the first and second accused respectively on an amended principal charge and an amended alternative charge which read as follows:

> AMENDED PRINCIPAL CHARGE
>
> C That you, between 24 November 2004 and 22 March 2005 at Bursa Malaysia Securities Berhad, 14th floor, Exchange Square, Bukit Kewangan, 50250 Kuala Lumpur, together with one Ng Chong Yeng (NRIC No. 660903-08-6161), in furtherance of a common intention of you all, created a misleading appearance of active trading of Suremax Group Berhad (Company No: 334228-K) shares on a stock market, that is Bursa
> D Malaysia Securities Berhad, through sale and purchase transactions of Suremax Group Berhad shares executed through the central depository securities accounts listed in the Appendix to this charge, which have the effect of raising the price of Suremax Group Berhad shares, and you have thereby committed an offence under section 84(1) of the Securities Industry Act 1983 (Act 280) read together with section 34 of the Penal
> E Code (Act 574), punishable under section 88B of the Securities Industry Act 1983;
>
> AMENDED ALTERNATIVE CHARGE
>
> That you, between 24 November 2004 and 22 March 2005 at Bursa Malaysia Securities Berhad, 14th floor, Exchange Square, Bukit
> F Kewangan, 50250 Kuala Lumpur, together with one Ng Chong Yeng (NRIC No. 660903-08-6161), in furtherance of a common intention of you all, created a misleading appearance of active trading of Suremax Group Berhad (Company No: 334228-K) shares on a stock market, that is Bursa Malaysia Securities Berhad, by indirectly being concerned in transactions
> G of sale and purchase of Suremax Group Berhad shares that do not involve any change in the beneficial ownership of the said shares, executed through the central depository securities accounts listed in the Appendix to this charge, and you have thereby committed an offence under section 84(1) of the Securities Industry Act 1983 (Act 280) read together with section 34 of the Penal Code (Act 574), punishable under section 88B of
> H the Securities Industry Act 1983.

The learned Sessions Court Judge (the trial judge), at the close of case for the prosecution, ruled that the prosecution had failed to prove a *prima facie* case against both the appellants on the principal amended charge. However, she held that a *prima facie* case on the amended alternative charge had been
I established by the prosecution against both appellants and accordingly called upon them to enter on their defence. They were convicted on the amended alternative charge at the end of the defence case. The first appellant was

sentenced to a term of imprisonment of 24 months and a fine of RM3 million in default 6 months imprisonment while the second appellant was sentenced to a term of imprisonment of three months and a fine of RM2 million in default six months imprisonment.

Both the appellants appealed to the High Court against their respective conviction and sentence. The appeal of the first appellant was dismissed. However, as regards the second appellant, while the appeal against his conviction was dismissed, his appeal against sentence was allowed in part when the learned High Court Judge reduced the sentence of imprisonment from three months to one day. The sentence of fine imposed by the trial judge was affirmed. However the second appellant was allowed to pay the fine in ten equal instalments of RM200,000, with a further one month imprisonment for each unpaid instalment.

[2] Apart from this appeal, there are three other separate appeals filed by both appellants and the prosecution before this court. These are:

(a) Criminal Appeal No. 09-110-04-2014 filed by the first appellant against sentence;

(b) Criminal Appeal No. 09-86-04-2014 filed by the second appellant against his conviction; and

(c) Criminal Appeal No. 09-104-04-2014 filed by the prosecution against the sentence imposed on the second appellant.

Since both appellants were jointly charged and for convenience, we heard all the appeals together, we propose to give reasons for our decisions in the four appeals in one judgment.

Ingredients Of The Offence

[3] The offence under s. 84(1) and (3)(a) read with s. 88B of the Securities Industry Act 1983 (the SIA) was found to have been committed by both appellants in furtherance of their common intention. The relevant extracts of s. 84(1)(a) of the SIA are reproduced below:

> 84.(1) Subject to section 87B, no person shall create, or cause to be created, or do anything that is calculated to create, a false or misleading appearance of active trading in any securities on a stock market in Malaysia or a false or misleading appearance with respect to the market for, or the price of, any such securities.
>
> (2) ...
>
> (3) Without affecting the generality of subsection (1), a person who:
>
> (a) effects, takes part in, is concerned in or carries out, either directly or indirectly, any transaction of sale or purchase of any securities, being a transaction that does not involve any change in the beneficial ownership of the Securities;

A (b) ...

(c) ...

shall be deemed to have created a false or misleading appearance of active trading in securities on a stock market.

B **[4]** The requisite elements which the prosecution is required to establish for an offence under s. 84(3)(a) so far as it relates and to the extent that it is relevant and applicable, to the charge in this case can be adequately and neatly stated as follows:

(a) the transactions did not involve any change in the beneficial ownership
C of the Suremax Group Berhad's shares (Suremax shares); and

(b) both the appellants were concerned in these transactions executed through the nine central depository securities accounts in furtherance of their common intention; and

D (c) both the appellants knew that these transactions did not involve any change in beneficial ownership.

In our view, it is beyond question that pursuant to s. 84(3)(a) of the SIA, where the requisite elements of the offence have been established, the appellants' acts in question shall be deemed to have created a misleading
E appearance of active trading of the Suremax shares on the stock market in Malaysia that is Bursa Malaysia Securities Berhad (Bursa Malaysia). The prosecution would, additionally, be required to prove that the offence was committed by the appellants in furtherance of their common intention under s. 34 of the Penal Code.

F **[5]** It would be a defence if the appellants can establish that the purpose for which they did the act was not, or did not include, the purpose of creating a misleading appearance and they did not act recklessly, whether or not they created a misleading appearance, of active trading in those shares on the stock market. This is provided for in s. 84(4) of the SIA.

G **Analysis Of Evidence**

[6] Suremax Group Berhad (Suremax) was, at the material time, a construction company listed on the Main Board of Bursa Malaysia. The uncontroverted fact throughout the whole case is that both the appellants
H were then directors of Impetus Development Sdn Bhd, Impetus Marketing Sdn Bhd and Impetus Unity Sdn Bhd. The appellants, together with Ng Chong Yeng who was also known as Ivan Ng (PW1), had procured 153 accounts including the nine accounts specified in the appendix to the alternative charge in 15 stockbroking firms to be opened under various
I individuals, including their families, friends and acquaintances to enable sales and purchases (trades) to be executed for the Suremax shares. The material evidence gleaned from the appeal record shows that the appellants had even used the companies which they helmed directorships and also their

employees to open accounts trade on the Suremax shares. PW6 was especially recruited by the first appellant to run errands for the application forms and have them filled in. The unchallenged testimony of PW6 reveals that the details of correspondence addresses and other particulars were supplied by the first appellant.

[7] On 12 April 2005, simultaneous raids were conducted at an apartment and residence of the first appellant and the house of the second appellant from which a substantial number of exhibits and documents were seized by the officers of the Securities Commission. Documents concerning the accounts and its trades led back to the addresses of Impetus office and also the home of the first appellant. In fact, a lot of documents relating to the trades of the above accounts were found, in no less suspicious circumstances (in the freezer, shoe box etc) at the apartment of the first appellant. Trading documents and computer were seized from the house of the first appellant. Some other documents that indicated connection with the trades were seized from the house of PW9, the bodyguard of PW1. There were other trading data and documentation which were seized from the house and car of the second appellant.

[8] The evidence led by the prosecution reveals that both the appellants together with PW1 had conducted these activities initially at the office of Impetus in Menara Millennium, Pusat Damansara, Kuala Lumpur. They then shifted their operations to Shangri-La Kuala Lumpur where the first appellant had maintained a room on the executive lounge on level 27 from which both appellants and PW1 surreptitiously continued operations conveying instructions to remisiers to transact in Suremax shares in the subject accounts including the said nine accounts at the relevant period. PW8 in this regard testified that he had conveyed instructions to trade to the remisiers upon being instructed by the first appellant and confirmed that his account was at all times controlled by the first appellant. The prosecution also called 15 of the account holders to testify on 29 of the subject accounts. They were PW1, PW7, PW8, PW10, PW21 to PW28, PW30, PW31 and PW 35. Except for PW35, all the other account holders admitted that they were nominees and that the Suremax trades in their respective accounts were not done on their instructions.

[9] PW7, PW8 and PW9 who were employees of the appellants testified that they had been present when both the appellants and PW1 telephoned the remisiers to buy and sell Suremax shares in the subject accounts. They also testified that there were occasions when they too had contacted the remisiers to buy and sell the shares. This was done on the instructions, of both the appellants and PW1.

[10] The prosecution called 13 of the 16 remisiers (PW11-PW20, PW29, PW32 and PW33) to testify. They confirmed that they had received instructions to trade in the said nine accounts from both appellants, PW1 and

PW8. Exhibit P156 shows that the first appellant had incurred charges for photocopying carried out by PW6, PW9 and PW10 that independently supports their testimonies that they were running errands for the first appellant to enable him to carry out the transactions in the accounts in question including the said nine accounts. PW6 and PW10 also assisted the first appellant to fill up application forms to open trading accounts and to send these forms to various stockbroking firms. There were several mobile phones and two computer monitors found from the hotel room displaying the movements of share price to enable the appellants to monitor the same.

[11] Conclusive evidence also shows that the first appellant played the main and major role as he had monitored the share price and dictated the price and quantity to buy and sell Suremax shares and the manner of the trade. The role of the second appellant was to procure further additional accounts in the whole scheme of things and had assisted the first appellant in conveying orders to trade as dictated by the first appellant, including his own account.

[12] Through these activities, between 24 November 2004 and 22 March 2005, Suremax shares were actively traded in a total of 153 accounts opened with 15 stockbroking firms including the said nine accounts. The volume of the shares traded was rising abnormally throughout the material period against the volume of the stock market which was declining. It is revealed in the evidence led by the prosecution that out of a total of 7,690,558,000 units of Suremax shares traded at that point of time:

(a) The buying volume transacted in these accounts was 4,234,423,000 units; and

(b) The selling volume transacted in these accounts was 4,054,415,000 units.

All of the accounts dominated transactions of buy and sell to a very large degree. There was only a small percentage of the total transactions that were conducted among outsiders with accounts other than the 153 accounts.

[13] It would be apt in the circumstances of this case to state that the transactions in the said nine accounts were not genuine, in that there was in effect, no change in beneficial ownership indicating the pattern of trade in the said accounts and between the said accounts was to buy and sell from each other which as the evidence has clearly shown, involved the appellants and PW1. Irrefutable oral testimony of PW38 and documentary evidence in exhs. P177-P179 and P191 show that during the period the said nine accounts executed these trades as shown below:

(a) The second appellant's account at CIMB Securities Sdn Bhd transacted the trades on 22 February 2005 at 11:35:26 for 40,000 units of Suremax shares at RM1.40 each;

(b) PW8's account at CIMB Securities Sdn Bhd executed the trades on 29 November 2004 at 16:51:27 for 50,000 units of Suremax shares at RM1.04 each;

(c) Impetus Development Sdn Bhd's account at CIMB Securities Sdn Bhd executed the trades on 10 December 2004 at 14:50:13 for 30,000 units of Suremax shares at RM1.06 each;

(d) Impetus Marketing Sdn Bhd's account at CIMB Securities Sdn Bhd transacted the trades on 14 January 2005 at 10:37:59 for 17,000 units of Suremax shares at RM1.31 each, on 25 January 2005 at 15:21:28 for 10,000 units of Suremax shares at RM1.34 each, on 8 February 2005 at 11:29:36 for 112,000 units of Suremax shares at RM1.42 each, and on 7 March 2005 at 15:53:15 for 130,000 units of Suremax shares at RM1.48 each;

(e) Impetus Unity Sdn Bhd's account at CIMB Securities Sdn Bhd transacted the trades on 21 February 2005 at 15:15:47 for 31,000 units of Suremax shares at RM1.44 each;

(f) PW1's account at CIMB Securities Sdn Bhd transacted the trades on 21 February 2005 at 12:28:03 for 1,000 units of Suremax shares at RM1.44 each;

(g) PW1's brother-in-law's account at CIMB Securities Sdn Bhd transacted the trades on 17 December 2004 at 12:25:41 for 7,000 units of Suremax shares at RM1.11 each, on 17 December 2004 at 12:25:41 for 93,000 units of Suremax shares at RM1.11 each, on 22 December 2004 at 15:25:21 for 50,000 units of Suremax shares at RM1.09 each, on 22 December 2004 at 15:25:21 for 50,000 units of Suremax shares at RM1.09 each, on 5 January 2005 at 16:17:29 for 220,000 units of Suremax shares at RM1.27 each and on 10 March 2005 at 16:31:15 for 4,000 units of Suremax shares at RM1.52 each;

(h) Yap Boon Han's account at Mayban Securities Sdn Bhd transacted the trades on 27 January 2005 at 16:07:56 for 100,000 units of Suremax shares at RM1.34 each and on 18 February 2005 at 11:36:39 for 200,000 units of Suremax shares at RM1.45 each; and

(i) The first appellant's wife's account at JF Apex Securities Sdn Bhd transacted the trades on 8 February 2005 at 11:57:37 for 20,000 units of Suremax shares at RM1.42 each.

It is also undisputed evidence that the price of Suremax shares plunged when the said nine accounts and other accounts in question ceased to trade abruptly on 22 March 2005.

[14] Based on the evidence outlined above, we agree with the trial judge's finding that the transactions executed in all the accounts including the said nine accounts were not genuine demand to invest in Suremax shares in that

there was, in effect, no change in beneficial ownership. The trial judge correctly found that exhs. P178 and P191 indicated that the pattern of trade in the nine accounts and between the nine accounts was to buy and sell from each other. She had also found that the prosecution's evidence established that the buy and sell orders for the Suremax shares in these nine accounts were done on the instructions of both the appellants and PW1. The fact that the appellants had used their accounts and also those of their companies, employees, family and friends were clearly indicative of their knowledge that their trades did not involve any change in the beneficial ownership of the shares transacted. The evidence, considered in its entirety, in our view, supports the trial judge's findings that it was both appellants and PW1 that had created a misleading appearance as to active trading of Suremax shares on the stock market which did not involve any change in the beneficial ownership of the said shares. This overwhelming evidence, without doubt, clearly shows the existence of common intention of both appellants and PW1 to commit the offence under s. 84(3)(a) read with s. 88B of the SIA. Accordingly, we are satisfied that the trial judge was correct in holding that all the ingredients of the offence had been established and thus triggered the deeming provisions in sub-s. (3) of s. 84 of the SIA. She was also correct in her finding that the prosecution had established a *prima facie* case on the alternative charge against the appellants.

[15] At the close of case for the defence, the trial judge found unacceptable the first appellant's defence that he had minimal knowledge as to how the stock market operated. On the contrary, she found overwhelming evidence that indicated both the appellants knew that the trades were carried out for manipulative purposes and that their denial in this regard was a fabrication. It was also her finding that the appellants were familiar with the stock market and concluded that it was improbable they did not know that the buying and selling of the Suremax shares during the material period was to manipulate the market. The trial judge considered the huge volume of Suremax shares purchased and noted that both appellants were aware that the nominee accounts were being used and a large number of remisiers were roped in to execute the trades.

[16] The trial judge further found that the Suremax trades were executed by the appellants and PW1 surreptitiously from the Shangri-La hotel room. The assertion by the appellants that they were not involved in the trading was contradicted by the prosecution witnesses who were present when these trades were executed and whose evidence in this regard was not challenged by the defence.

[17] The absence of an explanation from both appellants as to why these trades were surreptitiously executed from Shangri-La Hotel afforded further compelling evidence that they knew the transactions were done to manipulate the Suremax shares. What can safely be deduced from this evidence is that if the trades were for investment, there was no need for the trading to be executed in the manner it was carried out.

[18] The fact that contract notes and other related documents in respect of the Suremax shares recovered from the homes and apartment of the first appellant, clearly established that he was the mastermind of this manipulation scheme. It was also her finding that the explanation of the first appellant that the documents had been sent to him for accounting purposes sat most uncomfortably with the fact that many of these documents were found concealed in the freezer. The failure to proffer any explanation for the concealment of the trading documents was strong evidence that pointed that he did not play a secondary or minor role as claimed.

[19] The trial judge concluded that the defence had failed to rebut the statutory presumption, the prosecution had proved its case beyond reasonable doubt and convicted and sentenced both appellants accordingly.

[20] On appeal, the learned High Court Judge having considered the evidence in totality and in rejecting the appellants' defence, was satisfied that the appeals were without any merit and found that the conviction was safe as it was supported by the evidence. His Lordship concluded as follows:

(a) The trades conducted by the appellants in the said nine accounts which were opened by the appellants and their accomplice were transacted by them, not by the account holders;

(b) Each transaction involved huge volume of shares;

(c) The sales and purchases of these shares by the same parties on the instruction of the appellants and their accomplice did not involve beneficial transfer of ownership;

(d) The appellants' act of concealing the contract notes and related documents at several places had raised suspicion that it was intended to conceal the criminal act which had been committed.

The Appeals

[21] Both appellants raise several grounds in their appeals, but in essence these grounds are premised on the contentions which are confined exclusively to the issues of the admissibility of PW1's and PW38's evidence, Suremax's listing on Bursa Malaysia, the application of s. 34 of the Penal Code to s. 84(1) of the SIA, reasonable doubt on the existence of common intention, the presumption under s. 84(3)(a) and corroboration of accomplice evidence against the second appellant.

Decision

[22] Learned counsel for the first appellant has submitted that PW1's evidence was not admissible and that the first appellant was seriously prejudiced as PW1 did not complete his evidence and in consequence the first appellant was deprived of the opportunity to make out a statutory defence available to him under s. 84(4) of the SIA.

[23] We would make the true facts known at this point that PW1 was originally charged together with the appellants. However the charges against him were withdrawn on the first day of the trial and he was subsequently made the prosecution witness. He testified on 12 February 2007 which was the first day of the trial and continued on 13 February 2007. Thereafter, he had attended to complete his testimony on the 5 March 2007, 6 March 2007, 14 May 2007, 4 July 2007, 3 September 2007 and 3 October 2007 but the Sessions Court did not proceed with the hearing. He did not come to the court on 2 July 2007 as he was on medical leave. Then, at the next hearing date on 29 January 2008, PW1 did not attend court to continue his testimony. The prosecution had tried to contact him through his counsel but to no avail. PW1 did not turn up for the continued hearing on 5 March 2008 and 23 June 2008. The prosecution then proceeded with other witnesses. PW1's presence before the Sessions Court on numerous occasions to testify, in our opinion, shows that he had wanted to complete and he could have completed his testimony if it were not for the postponements.

[24] First and foremost, based on the evidence, we acknowledge that PW1 is an accomplice. We make this finding as it is now obvious and trite that the court is required to first examine the evidence to determine whether a witness should be treated as an accomplice before he should be treated as one (*Pasupathy Kanagasaby v. PP* [2005] 1 CLJ 442; [2005] 1 MLJ 493; *Nathan v. PP* [1972] 1 LNS 99; [1972] 2 MLJ 101; *Ng Kok Lian & Anor v. PP* [1983] 2 CLJ 247; [1983] CLJ (Rep) 293; [1983] 2 MLJ 379). Additionally, his evidence would in our view, only prove valuable to the trial if the court finds that he is credible and his testimony is corroborated by independent evidence. However, it is abundantly clear that the findings of facts and the guilt of the appellants did not rest on PW1's testimony at all. Therefore the question of whether the first appellant was given a fair trial or prejudiced did not arise. There is undoubtedly irrefutable evidence before us on the roles played by the first and second appellants. They had ample opportunity to cross-examine and challenge the prosecution's witnesses. The appellants had the liberty to put forward his defence by adducing other independent evidence to support his case. This, they had failed to do. They did not call any witness. They were accorded a fair trial. The evidence before this court proves beyond reasonable doubt all the ingredients of the offence against the first and second appellants. The *actus reus* and *mens rea* of both appellants together with the deeming provisions under s. 84(3) upon which they had failed to invoke the statutory defence to rebut it clearly shows that the conviction is safe.

[25] The prosecution had called 38 witnesses to the stand to adduce evidence to piece together the whole picture on how both the appellants had committed the crime. The prosecution case has no gaps. The trial judge when convicting and the High Court Judge when affirming the convictions against both appellants had relied on the testimonies of other prosecution witnesses

and the documentary evidence. The High Court moreover, had correctly acknowledged that the prosecution case did not rest solely on the evidence of PW1.

[26] The prosecution had made an attempt to tender the statement of PW1 to which both the appellants had objected. This fact in itself shows that the appellants were not prejudiced. In any event the trial judge had carefully evaluated all other direct evidence that beyond reasonable doubt proved that the appellants had committed the offence and admitted that it would be dangerous and wholly unsafe to accept the testimony of an accomplice whose evidence had not been subjected to cross-examination. The argument by learned counsel for the first appellant on the admissibility of PW1's evidence is in our view, devoid of any merit and must be rejected.

[27] Learned counsel for the first appellant has also submitted that Suremax was not listed on Bursa Malaysia as the prosecution did not lead any evidence that Suremax was listed on the Main Board of Bursa Malaysia as alleged in the charge. The failure to do so according to learned counsel, is fatal to the case for the prosecution as that evidence forms a main ingredient of the offence. The lack of evidence on such a material point, learned counsel argues, left a serious gap in the case for the prosecution. Learned counsel refers to *Sia Soon Suan v. PP* [1965] 1 LNS 165; [1966] 1 MLJ 116 and *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 16 to support his submission on this issue.

[28] Having perused the evidence in the appeal records, we are satisfied that there is ample unchallenged evidence that shows that Suremax is a public listed construction company listed on the Main Board of Bursa Malaysia and its shares are traded thereon. During the trial, the appellants did not dispute the existence of Suremax as a listed entity. The Stock Code of Suremax No. 7072 where Suremax shares were listed on the stock exchange were found in documentary exhibits described as match and order report of Suremax marked as P176, P178 and P179, Contract Notes issued by the stockbroking companies marked as P3(113), P3(114), P3(115), P3(117), P3(118), P38A, P39A, P43A, P54A to P71A, Contra Statement from RHB Securities Berhad marked as P3(111) and the statement of account of one Chuah Yook Kim issued by Bursa Malaysia marked as P3(42).

[29] Throughout the entire trial, all the witnesses were testifying on Suremax shares which were traded on the stock market. The remisiers, PW11-PW20, PW29, PW32 and PW33 all confirmed that they had received instructions from the appellants with the assistance of PW1 and PW8 to trade the Suremax shares in the 153 accounts including the said nine accounts. In fact, both the appellants in their respective testimonies confirmed that they had traded in the Suremax shares on Bursa Malaysia during the material period. Exhibits P176, P178 and P179 are the official documents encapsulating the data of the Suremax trades that was executed on the stock market. We would say that there was never a moment of mistaken identity as to the shares that are the subject matter of the manipulation charge.

[30] There is therefore ample evidence that would show that Suremax is listed on the Main Board of Bursa Malaysia. Suremax shares, in our opinion, could not have been traded in the manner the sales and purchase were being carried out by the appellants in this case if Suremax is not listed on the Main Board of Bursa Malaysia. The appellants' conduct in trading in Suremax shares patently shows that they were consciously aware that Suremax is a listed entity on the Malaysia stock exchange.

[31] We would further add that the fact that Suremax is listed as a construction company whose shares are traded on the Main Board of Bursa Malaysia is a known fact in the public domain. This notorious fact is a subject of common and general knowledge to the public. Judicial notice therefore is apt to be applied in this case. We are mindful that the matter of which we can take judicial notice must be a subject of common and general knowledge which to put it in another words, would require judicial knowledge of facts is to be measured by general knowledge of the same facts. A fact is said to be generally recognised or known when its existence or operation is accepted by the public without qualification or contention. The test is whether sufficient notoriety attached to the fact involved as to make it proper to assume its existence without proof (see *Lee Chow Meng v. PP* [1975] 1 LNS 199; [1976] 1 MLJ 287; *Johnson Tan Han Seng v. PP & Oher Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66; *Re Lin Securities (Pte) Peter Chi Man Kwong & 2 Ors v. Asia Commercial Bank & 20 Ors* [1988] 1 LNS 159; [1988] 2 MLJ 137).

[32] The list for the court to take judicial notice is not exhaustive and s. 57 of the Evidence Act 1950 does not prohibit the court from taking judicial notice of other facts not mentioned therein (see *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* [1985] 1 LNS 122; [1986] MLJ 30).

[33] We agree with the prosecution's submission that the Suremax's listing on Bursa Malaysia is a notorious fact as it is a known fact in the public domain. The fact is sufficiently notorious as to make it proper for this court to assume its existence without proof.

[34] We would accordingly reject the first appellant's submission on the issue under consideration as being wholly unmeritorious.

[35] Learned counsel for the first appellant had next submitted that the evidence of PW38 ought not to have been admitted as there was no evidence of expertise on his part in respect of market manipulation, and that PW38's evidence as regards market manipulation was seriously flawed and ought to have been rejected. It was also contended by learned counsel that PW38's evidence ought not to have been admitted as the data of the Kuala Lumpur Composite Index was inadmissible because the accuracy of the data that PW38 had downloaded from the KLSE website was without a certificate issued pursuant to s. 90A of the Evidence Act 1950.

[36] The trial judge, while considering the evidence in respect of the principal charge, ruled that in the absence of the s. 90A certificate, PW38's findings which were based on the data he downloaded from the KLSE website to conduct his analysis was inadmissible.

[37] The prosecution led evidence on his expertise, experience and qualification. The trial judge found that PW38 had the necessary expertise to testify as an expert witness. After duly considering the evidence on PW38's expertise, we have no reasons to disagree with her finding.

[38] It is to be noted that PW38 had conducted his analysis using:

(a) Data from the order and match reports (exhs. P176 to P179) which were provided by the Securities Commission;

(b) Data from downloading the closing value of the Kuala Lumpur Composite Index, a representative barometer which is indication of the price movement of the whole market and is publicly available; and

(c) Suremax public announcements on the stock market which is already in the public domain.

[39] The conviction by the trial judge on the alternative charge and affirmed by the High Court is based on the order and match reports assisted by the summary of the said data by PW38 in exh. P191 which indicated that the pattern of trade in the nine accounts and between the nine accounts was to buy and sell from each other on the same price. In our judgment, the issue of certificate under s. 90A has no place in the prosecution and conviction of both the appellants under the alternative charge. When the trial judge convicted the appellants on the alternative charge she did not rely on the data which she had ruled to be inadmissible. We would moreover like to reiterate that PW38 relied on the order and match reports in order to prove the offence under the alternative charge. These documents were not challenged by the defence.

[40] PW38 in his evidence testified that when he calculated the trades, it had amounted to 1,165,000 units of Suremax shares with the average price of RM1.316 per unit, which seemed on the high side. Based on all the studies he had made, PW38 testified that it appeared to be strong evidence that this seemed to be the case of manipulation. We note that there was no cross-examination as to the method employed by him. The match report (exh. P178) undoubtedly shows that the trades of the nine accounts amounting to 1,165,000 units of Suremax shares during the material period constitutes 15.1% of the total volume traded in Suremax shares on the stock market during the material period, the fact that shows that such trading was active. The value of expert opinion can never be doubted. Expert opinions have a high probative value. This is because an expert witness has the necessary experience in arriving at and justifying his opinion in his specialised field. Moreover, expert opinion can readily be tested against the known facts and

the opinion of another expert called by the opposing party (see *Samundee Devan Kerishnan Muthu v. PP* [2009] 1 CLJ 498; [2009] 1 MLJ 697). The appellants in the present appeal had failed to challenge the findings of PW38 and had also failed to call their own expert witness to contest the findings of PW38.

[41] In our judgment, the trial judge was correct in admitting PW38's evidence in respect of the alternative charge.

[42] We shall next turn to consider learned counsel's submission that common intention under s. 34 of the Penal Code only applies to offences in the said Code. For s. 34 to apply to other offences under any other law, learned counsel submits, there was a need to extend words used in the Penal Code to outside the Penal Code. Learned counsel refers to s. 40 of the Penal Code which provides that a reference to the word 'offence', as a general rule, is a reference to an offence under the Penal Code only. The Penal Code should not be interpreted beyond its literal meaning to extend the application of s. 34 to offences under the SIA. It is trite law that looking at criminal cases adjudicated by our courts, the provisions of common intention under s. 34 of the Penal Code, which describes the principle of joint liability in the commission of criminal acts, can be applied to any criminal case when the facts so warrant. *Ratanlal And Dhirajlal's Law of Crimes*, 26th edn at p. 85 aptly describes that the section does not create a distinct offence; it lays down only a principal of joint liability; it is only a rule of evidence and does not create a substantive offence (see also *Krishna Rao Gurumurthi v. PP And Another Appeal* [2009] 2 CLJ 603; *Mohd Sahir Awang & Satu Lagi lwn. PP* [2014] 1 LNS 969; [2015] 1 MLJ 595).

[43] This rule of evidence of common intention under s. 34 of the Penal Code is seen to be applied with the commission of crimes regulated under various Acts of Parliament including the Dangerous Drugs Act 1952, the Firearms (Increased Penalties) Act 1971 and the Arms Act 1960 (see *Koo Wing Cheung & Anor v. PP* [2014] 1 CLJ 46; *Lai Kum Leng & Satu Lagi lwn. PP* [2013] 1 LNS 529; *Ismail Mansor & Anor v. PP* [2014] 1 LNS 1413; [2015] 2 MLJ 534). We extract the contents of s. 34 of the Penal Code below:

> 34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

It is obvious that there is no reference or description of the word 'offence' in s. 34. Thus the angle that the second appellant is trying to contend cannot be applied here as the legal provision concerns a criminal act. The word used in s. 40 of the Penal Code is "offence". It cannot be clearer that s. 34 of the Penal Code does not create an offence but provides for a rule of evidence describing joint criminal liability. Thus in this particular context, s. 40 of the Penal Code is not applicable to this case and learned counsel's contention therefore is fallacious.

[44] As defined by the Privy Council in *Barendra Kumar Ghosh v. Emperor* AIR 1925 PC 1 'a criminal act means that unity of criminal behaviour which results in something, for which an individual would be punishable.' The Singapore Court of Appeal in *Tan Hung Thiam And Another v. Public Prosecutor* [1991] 1 SLR (R) 689, in applying the definition of 'criminal act' in *Barendra Kumar Ghosh*, *supra* said:

> It is clear from the Privy Council's interpretation of the words 'criminal act' that it is the result of a criminal act which is criminal offence. It then remains, in any particular case to find out the actual offence constituted by the 'criminal act'.

In other words, a 'criminal act' means that unity of criminal behaviour, which results in something for which an individual would be punishable if it were done by himself that is a criminal offence. Section 34, when it speaks of criminal act carried out by several persons in furtherance of common intention of all, has regard not to the offence as a whole, but to the criminal acts, which result in the offence (*Ratanlal & Dhirajlal's Law of Crimes*, 26th edn at p. 121). For the reasons discussed, we cannot accede to the argument urged for the second appellant on this issue. We are of the opinion that common intention under s. 34 of the Penal Code applies, not only to offences under the Penal Code, but also to other offences outside the Penal Code.

[45] For the second appellant, learned counsel has also submitted that there was a reasonable doubt on the existence of common intention. The existence of common intention is a question of fact and each case can be proved as a matter of inference from the circumstances of the case (*Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17). The trial judge had considered all the material evidence and circumstances before arriving at her decision to find the appellants guilty. The evidence has manifested a clear proof of common intention of both appellants and PW1 in committing the offence. We would therefore hold that the prosecution had proven beyond reasonable that both appellants, in furtherance of the common intention between them had committed the offence with which they were found guilty by the Sessions Court and affirmed by the High Court. There is overwhelming evidence that supports their conviction which we have already alluded to earlier in our judgment and we do not intend to repeat it here.

[46] On the issue of the presumption under s. 84(3)(a) of the SIA, learned counsel refers to s. 107B(1) of the Companies Act 1965 (Act 125) which *inter alia* provides that a depositor whose name appears in the record of depositors maintained by the central depository shall be deemed to be a member of the company and shall be entitled to the number of securities stated in the record of depositors and all rights, benefits, powers and privileges and be subject to all liabilities, duties and obligations in respect of, or arising from, such securities. We are pressed by learned counsel with the argument that when it is read with s. 107D(1) of the Act 125, these provisions would mean that

A the holder of a central depository securities account would have all the rights, benefits, powers and privileges and all the liabilities, duties and obligations in respect of, or arising from the securities registered in the name of the said account holder subject to two exceptions in s. 107D(1) of the Act 125 which exceptions according to learned counsel, did not apply to this case. B Parliament, learned counsel submits, had intended that s. 107B(1) should override s. 84(3) of the SIA. We wish to state that the proposition by learned counsel is misplaced and totally incorrect. The evidence proves that both the appellants had committed the crime under s. 84(1) and (3)(a) of the SIA, they cannot hide behind any other laws in order to absolve themselves from C criminal liability.

[47] Undisputed evidence shows that amongst others, both the appellants together with PW1, assisted by PW8 had operated and used the nine accounts listed in the charge in their operations, jointly and collectively from the hotel room in Shangri-La Hotel. Their trades also undisputedly show that D there was no change in the beneficial ownership of the said Suremax shares. This finding of fact is apparent from the evidence in this case. The transactions to buy and sell were conducted in the same account and between the accounts in question on the instructions of both appellants. Irrefutable evidence shows that the said nine accounts executed these trades. Section E 84(3) of the SIA should therefore come into operation where both the appellants shall be deemed to have created the misleading appearance of active trading in the Suremax shares in furtherance of their common intention. Even without the operation of the deeming provisions of s. 84(3), the prosecution had proven the *mens rea* of both the appellants. Therefore, both the appellants being the true perpetrators in committing this crime, and F not the account holders, cannot use or argue that s. 107B(1) of the Act 125 protects them from any liability.

[48] The argument that s. 107B(1) of the Act 125 comes after the enactment of s. 84(3) of the SIA so the former should prevail is unacceptable. In criminal cases, the court will account for those responsible for the crimes and G punish them accordingly. Although on the face of it, there are the account holders who are entitled to the privileges, rights and liabilities of the accounts, undisputed is the fact that both the appellants together with PW1 had utilised the said nine accounts to create a misleading appearance of active trading With the greatest of respect, whilst s. 107B(1) of the Act 125 deals H with the opening of accounts and obligations that come with it, s. 84(3) of the SIA specifically deals with facts in a criminal prosecution where it is proven that the trades did not involve any change in the beneficial ownership of the shares. In *PP v. Chu Beow Hin* [1982] 1 MLJ 135 at p. 137, His Lordship Raja Azlan Shah had this to say:

I

> It is a special enactment and in passing it, the legislature had its intention directed to the special case which the statute was meant to meet and considered and provided for all the circumstances of the special case

> where a special provision is made in a special statute, that special provision excludes the operations of a general provision in the general law - *generalibus specialia derogant*.

The legal principle enunciated in that case, in our judgment, applies here as although s. 84(3) of the SIA came into force earlier than s. 107B(1) of the Act 125, the said law deals specifically with the market misconduct and facts of the case at hand.

[49] Learned counsel has further submitted that reasonable doubt existed on whether the trades in Suremax involved changes in beneficial ownership of Suremax shares. We should say, for clarity, that this is a case where the said nine accounts on all those numerous occasions had bought and sold the same Suremax shares in its respective accounts. Therefore it falls squarely within the provision of s. 84(5) of the SIA. The trial judge had identified the persons alleged to have unchanged beneficial ownership of Suremax shares before and after the transactions, when she stated in paras. 33 to 35 that:

> 33. To establish the first ingredient, the Prosecution relied on the Order and Match Report P178 to show that the Suremax trades in 9 accounts identified in the charge were not genuine in that there was, in fact, no change in beneficial ownership. Exhibits P178 and P191 indicated that the pattern of trade in the 9 accounts and between the 9 accounts was to buy and sell from each other and at the same price.
>
> 34. As regard to the second and third ingredients, the testimonies of the Prosecution Witnesses established that the buy and sell orders for the Suremax trades in these 9 accounts were done on the instructions of the accused persons and Ivan Ng. It was reasonable to infer from this evidence that the accused persons would have consequently known that these transactions did not involve any change in beneficial ownership.
>
> 35. It is to be noted that upon proof of the above facts, the deeming provision in section 84(3) comes into operation, namely that by those trades, the accused persons had intended to create a misleading appearance of active trading of Suremax shares on the KLSE.

The buying and selling were done in each of the said nine accounts by both the appellants together with PW1 and assisted by PW8. We agree with the finding of fact by both the Sessions Court and the High Court that the trades conducted in the nine accounts during the material period did not involve any change in the beneficial ownership of the Suremax shares. As such, s. 84(3) of the SIA comes into operation.

[50] Learned counsel's submission next turns on exh. P191 which he seeks to impress upon us that no reliance should be placed thereon as it was merely an expert opinion of PW38. Exhibit P191 is actually an illustration or snapshot of data in exhs. P176 and P178 made for the convenience of the court. Exhibits P176 and P178 are conclusive data captured by the stock exchange of transactions in Suremax shares executed in all the accounts including the said nine accounts for the material period. We find that there

was no challenge whatsoever on this evidence during the trial which in effect, tantamount to the acceptance of the facts it carries. PW38 who is the maker of exh. 191 testified at the Sessions Court and there was no challenge on the contents or the making of exh. P191. The exhibit summarises the trades in the nine accounts during the material period. Any contention of unreliability or prejudice by the second appellant must surely be rejected.

[51] It is further submitted by learned counsel for the second appellant that the presumption under s. 84(3)(a) of the SIA should only apply against the first appellant. In our judgment, the second appellant's denial of his role in the commission of the offence cannot be accepted as the evidence of PW15, PW7 and PW4 shows:

(a) The procurement of numerous accounts by the second appellant;

(b) The aggressive instructions by him to various remisiers to trade in Suremax almost on a daily basis throughout the material period from the Shangri-La Hotel room;

(c) The second appellant's negotiation for settlement for the contra losses incurred in the accounts used to trade when he admitted that he and the first appellant had discussions and meetings with the remisiers when the price of the Suremax shares plunged, resulting in heavy losses in the subject accounts; and

(d) Trade documents found in his house and car.

Based on the evidence in this case, it is a correct finding of fact that the second appellant together with the first appellant and PW1 were in cahoots and in furtherance of their common intention to commit and had in fact committed the offence by controlling and executing the trades in the nine accounts. It would follow therefore that upon proof that the trades in question did not involve any change in the beneficial ownership of the Suremax shares, the presumption under s. 84(3)(a) of the SIA would apply to the said second appellant in as much as it applies to the first appellant. It would be manifestly incorrect to invoke the presumption only against the first appellant.

[52] Learned counsel for the second appellant has also contended that the accomplice's evidence against the second appellant was not corroborated. The accomplices in this case are both the appellants and PW1. It would be erroneous to hold the other witnesses namely PW6, PW8 and PW11 accomplices as contended by the second appellant's counsel. Before this court can be persuaded by learned counsel's submission to look for corroboration of accomplice evidence against the second appellant, we must first decide whether a witness is an accomplice (*Nathan v. PP* [1972] 1 LNS 99; [1972] 2 MLJ 101, at p. 103). Apart from both the appellants and PW1, the other witnesses did not have the requisite *mens rea* for this court to hold them as accomplices. We refer to the decision of the Court of Appeal in *Pasupathy Kanagasaby v. PP* [2005] 1 CLJ 442; [2005] 1 MLJ 493 at p. 512:

> In deciding whether a witness should be treated as an accomplice, the trial judge should ask himself this question: Is there any evidence upon which I can properly rule that the witness was a participant in the offence?

[53] The Court of Appeal held in *Azlan Alias v. PP* [2009] 1 LNS 534; [2009] 4 MLJ 493 at p. 494:

> To treat SP6 and SP7 as accomplices, there must be evidence of their participation in the commission of the offence supported by a wrongful act and accompanied by a guilty mind. The defence had never suggested the complicity or guilty of SP6 and SP7 in relation to their role or participation in the transfer and withdrawals of the amount in question. SP6 and SP7 had acted on the instructions of the accused. They were merely subordinates to the accused. There was no evidence that SP6 and SP7 knew of the scheme which the accused had prepared and carried out ...
>
> An accomplice being *particeps criminis* is one who participates or is associated with another person as a partner in the commission of a crime. A crime involves 2 essential elements *viz actus reus* which is the wrongful act, and *mens rea* which is the guilty mind. This is reflected in the maxim '*actus non facit reum nisi mens sit rea*' (the act and the mind must concur to constitute the crime). The act does not make a person guilty unless his mind be guilty. This principle, which applies to the commission of an offence as a principal offender, applies with equal force to an accomplice.

[54] PW8 was merely under the instructions of both the appellants and PW1. PW8's testimony, corroborated by other witnesses, shows without reasonable doubt that his status is that of a subordinate executing the instructions of both the appellants who were his directors. There is no evidence that he had the requisite *mens rea* to commit the offence the appellants are convicted of. As regards PW7, we find that he did not participate in the commission of the crime. He had no knowledge as to what his employers namely the appellants were up to in the room in Shangri-La Hotel.

[55] PW16 is a remisier who had carried out her duties in executing the instructions that she had received from the appellants PW1 and PW8. Her state of mind was not to create a misleading appearance as to active trading on the stock market in Suremax shares during the material period. The second appellant's contention that she was an accomplice had never arisen. She was only cross-examined to confirm that the second appellant did in fact give instructions and that she knew the second appellant.

[56] The second appellant's attempt to stretch the definition of accomplice to the account holders (who had no knowledge), remisiers (independent participants of the market executing orders) and employees of the appellants cannot be allowed. They are independent, credible witnesses whose testimonies were rightfully given due weight for a finding of both the appellants' culpability and involvement.

[57] For the second appellant, it is submitted that if the second appellant had been acquitted of the principal charge, a conviction on the alternative charge might not be safe and should be set aside. With respect, the second appellant's submission that there is no evidence beyond reasonable doubt that proved the second appellant had created a misleading appearance as to the active trading of Suremax shares is incorrect. There is overwhelming evidence both direct and circumstantial which we have already alluded to, incriminating the second appellant to the crime he was convicted of. There is therefore no issue with the evidence relied upon by the Sessions Court as well as the High Court given that the second appellant is acquitted of the amended principal charge.

[58] It is pertinent to note that the Sessions Court accepted the expertise and opinion of PW38 but for the lack of certificate under s. 90A of the Evidence Act 1950 for the data downloaded from the stock exchange, she did not place any reliance on the price movement. This was the sole reason why both appellants were not ordered to enter their defence to the amended principal charge. The second appellant faced an alternative charge not a distinct further charge. In cases where the accused faces an alternative charge, the trial court is at liberty to elect which charge has been proven beyond reasonable doubt. The learned trial judge had clearly laid out the ingredients required by the prosecution to prove in respect of the offence for the alternative charge and considered it in great detail against the evidence adduced (see *Murugan Muniandy v. PP* [2014] 11 MLJ 161 as an illustration that clearly depicts the position in this appeal). We note that the prosecution had adduced strong, independent, corroborative evidence against both the appellants that were unchallenged and irrefutable which in law tantamount to an acceptance of such evidence by the defence (*Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212). Having all these accepted facts before this court, their defence amounted to merely a bare denial. Such denial did not cast a doubt on the prosecution case against the appellants (see *DA Duncan v. PP* [1980] 1 LNS 12; [1980] 2 MLJ 195, *Lee Kwai Heong & Anor v. PP* [2006] 1 CLJ 1043; [2006] 2 MLJ 528, and *PP v. Ling Tee Huah* [1980] 1 LNS 212; [1982] 2 MLJ 324).

[59] The defence has criticised the prosecution for not calling account holders Chua Yoke Kim (the first appellant's wife), Teh Chop Bun (the first appellant's brother-in-law) and Yap Boon Han (partner to both the appellants' co-director) as witnesses and urged this court to draw an adverse inference against the prosecution. The rulings by both the Sessions Court and High Court are correct that there is no adverse inference against the prosecution for not calling these persons as witnesses. This is because:

(a) The unchallenged evidence of the remisiers had confirmed that the instructions for the trades in those accounts were from both the appellants, PW1 and PW8;

(b) The unchallenged evidence of PW8 that both the appellants were directors for the Impetus Group (where the first appellant was the authorised person to trade in the securities accounts);

(c) Both appellants admitted to conveying instructions to remisiers for the trades; and

(d) The said account holders were offered to the defence at the close of the prosecution's case.

Coupled with the fact that there are no gaps in the prosecution's case, the Sessions Court and High Court are justified in concluding that there is no adverse inference to be drawn against the prosecution. We have no hesitation in rejecting learned counsel's submission on this issue.

[60] Arising from the above deliberations, we find that all the evidence had been duly adduced and admitted in accordance with the rules and procedure laid down by the Criminal Procedure Code and the Evidence Act 1950. When such evidence is considered in its entirety and upon conducting maximum evaluation of the same, in accordance with s. 182A of the Criminal Procedure Code, we are satisfied beyond reasonable doubt that all the essential elements of the offence under s. 84(1) and (3)(a) of the SIA read with s. 34 of the Penal Code had been established accordingly and on the contrary the defence had failed to rebut the statutory presumption in s. 84(3). In the premises and for the reasons discussed, it is our judgment that both the trial judge and High Court Judge were correct when they found that the prosecution had proven its case against both appellants beyond reasonable doubt and in finding them guilty on the alternative charge. The appeal is therefore dismissed. The convictions of both appellants are affirmed.

Sentence

[61] The prosecution in Criminal Appeal No. 09-110-04-2014, appeals against the decision of the learned High Court Judge in reducing the sentence of imprisonment imposed by the trial judge on the second appellant contending *inter alia* that His Lordship had erred in substituting the sentence as he did. The first appellant in Criminal Appeal No. 09-11004-2014, on the other hand, appeals against the sentence imposed on him by the trial judge and affirmed by the learned High Court Judge. It is submitted by learned counsel that the imposition of such sentence is manifestly excessive and that the trial judge went into error when she said that the court had a duty to set imprisonment as the new benchmark for market manipulation cases despite the fact that s. 88B of the SIA makes it clear that a fine must also be taken as a first consideration in cases of this nature. We propose to deal with both appeals together.

[62] We begin by stating the obvious. In considering an appeal against sentence, an appellate court should be slow to interfere with or disturb a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proven facts and circumstances.

A It is important to bear in mind that the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence (*PP v. Mohamed Nor & Ors* [1985] 1 LNS 170; [1985] 2 MLJ 200). In the case of *PP v. Karthiselvam Vengatan* [2009] 4 CLJ 632, at 635 it
B was held:

> An appellate court should not intervene unless the court below has erred in principle, that is to say, it took into account irrelevant consideration or failed to take into account relevant considerations or passed a sentence that is manifestly excessive or manifestly inadequate or not permitted by
C law. In short, an appellate court has no original discretion of its own but may act when sentencing court has gone wrong in the sense just discussed.

[63] Keeping in mind the above principle, it is clear from the judgment of the trial judge that the correct principles were applied and all relevant
D evidence and sentencing factors required by law were considered by her when imposing the sentences on the first and second appellants. We do not find any sentencing error which renders such sentences plainly unreasonable or unjust. The relevant excerpt from her decision reads as follows:

> In crafting an appropriate sentence, I took into account the fact that
E market manipulation is a serious offence as it undermined investor confidence and the integrity of the securities market. It is in the interests of the country and economy that the securities market should be real and genuine, completely free from manipulation. Thus, offenders who commit these offences need to be deterred and the court has a duty to set imprisonment as the new benchmark for market manipulation offences.
>
F The next question is the length of the custodial sentence that is appropriate in this case. It is true that until the commission of the offences, both the accused had unblemished records. This was the sole mitigating factor in their favour. In the light of this factor, I asked myself whether a short imprisonment term under the "clang of the prison gates"
G principle should be applied here. This is a well-known sentencing principle. This principle is that when a person in his 40s or 50s finds himself faced for the first time in his life with a criminal conviction, the mere fact that he goes to prison is a very grave punishment indeed. The closing of the prison gates behind him, for whatever length of time they may stay closed, is a grave punishment.
>
H In respect of the first accused, there was a need for a deterrent sentence because of his active role in the scheme and the lack of remorse shown. He was convicted after a trial. I therefore did not think a clang of the prison gates sentence would suffice. In the circumstances, I was of the view that a term of imprisonment of 2 years was more appropriate. I
I therefore sentenced him to 2 years and imposed affine of RM3 million.
>
> In respect of the second accused, I was of the view that because of the subordinate role he played in the scheme, a clang of the prison gates sentence was adequate. I therefore sentenced him to 3 months imprisonment and imposed a fine of 2 million.

[64] The High Court Judge, in considering the appeal against sentence by the second appellant, had considered that a sufficient discount on the sentence was warranted due to the fact that the second appellant was not the mastermind in the commission of the offence. With respect, His Lordship had erred because it is apparent that he had failed to consider that the trial judge, in sentencing the second appellant to three months imprisonment and a fine of RM2 million had already taken into account the fact that the second appellant played a subordinate role in the whole scheme. Notwithstanding that, however, we are of the opinion that the learned High Court Judge ought to have addressed his mind to the evidence of the role played by the second appellant who had undoubtedly colluded with the first appellant in committing the offence.

[65] We would in this regard consider a pertinent fact that the second appellant and the first appellant were charged in furtherance of their common intention under s. 34 of the Penal Code in creating a misleading appearance of active trading of Suremax shares. It is recognised that an individual accused person is held to be responsible for the criminal acts committed by several persons in furtherance of the common intention of all irrespective of the role played by each accused person in the perpetration of the offence. Thus, it was held in the case of *Muhammad lsa Aris & Ors v. PP* [2011] 3 CLJ 510; [2011] 5 MLJ 342 at p. 351 that:

> The sentence meted out must be proportionate to the offence. It is often said that the business of the court is to do justice and this can be achieved if the sentence is proportionate between one offender to that of another.

[66] In the present case, the first appellant was sentenced to imprisonment of 24 months and fine of RM3 million. On the other hand, the sentence of imprisonment meted out against the second appellant who is guilty of the same offence committed in furtherance of the common intention had been reduced from three months to only one day. In doing so, the learned High Court Judge had erred as the reduction did not commensurate with the offence and the role the second respondent had played in its commission which, in our judgment, clearly portrays inconsistency of the sentences imposed on both appellants in the same case. Moreover, the evidence adduced by the prosecution clearly shows that the offence committed by both appellants was premeditated. A deterrent sentence therefore is appropriate. (*PP v. Loo Chang Hock* [1988] 1 CLJ 76; [1988] 1 MLJ 316).

[67] The emphasis by the High Court Judge of the second appellant being a first offender and not having previous criminal records is erroneous in securities crimes. The existence of unblemished record should and could never of itself be sufficient to save both the first and second appellants from a sentence of imprisonment. We refer to the decision pronounced in the case of *Securities and Futures Commission v. Choi Wai Zak & Anor* [2003] 1 HKC 30 in support of this proposition whereby it was held that:

> The existence of a clear record in a sufficiently serious case could never of itself be sufficient to save a person from an immediate sentence of imprisonment. Market manipulation was a serious offence and the judge was aware of the trend of the increase of the crime.

The learned High Court Judge had obviously overlooked the fact that the trial judge had already correctly taken this into account when considering the sentence to be imposed against the second appellant. She even acknowledged that this was the sole mitigating factor in favour of both appellants. Having considered the sentencing factors correctly and the gravity of the offence committed, we do not think that she had passed the sentences which were not permitted by the law.

[68] The learned High Court Judge had also considered the penalty provisions in s. 88B of the SIA and ruled that the same did not provide for mandatory imprisonment sentence on the basis that the provision of fine was placed before the custodial sentence. We would also mention that learned counsel for the first appellant has also submitted on this issue asserting that s. 88B of the SIA makes it clear that a fine must be taken as a first consideration in cases of this nature. In our judgment, in considering appropriate sentence, the court would have to consider it with the facts and circumstances of the case so that where it merits a custodial sentence, the court should not hesitate to mete out such punishment. Thus, in *Lim Guan Eng v. PP* [2000] 2 CLJ 541, the Court of Appeal held:

> True, that section 4 of the Sedition Act provides for a fine in priority to a term of imprisonment as punishment. But this is not to say that a court ought never to send a person to prison for sedition. It all depends on the facts of each case.

[69] We would in addition hold that there is a need for strong enforcement of our securities laws. The offence of which both appellants are found guilty of is one of the most serious securities law offences. It is in the public interest that the court mete out deterrent sentences against offenders as not only would it serve as a lesson to them and deter would-be offenders, but also instil confidence nationally and on international level of our capital market and economy as a whole. There is in our opinion, an obvious failure on the part of the learned High Court Judge to give appropriate consideration to the element of public interest when His Lordship varied the sentence of imprisonment. The sentence imposed by the learned High Court Judge we should say, would not serve as a useful lesson to the second appellant and the public at large. On the same note, we would also emphasise that to reduce the sentence imposed on the first appellant would equally not be in the public interest and would not serve as a deterrence on him or inhibit any potential wrongdoer from committing an offence of this nature. The court would be sending a wrong signal and impression to the public that market manipulation is a non-serious offence. A light sentence would, in our opinion, be in conflict with the underlying intention of the legislature as the

punishment provided for in s. 88B of the SIA plainly manifests the needs for severe penalty to be imposed. The trial judge was therefore correct when she stated that the court had a duty to set imprisonment as the new benchmark for market manipulation offences.

[70] Taking into account the above factors, we hold that the decision of the learned High Court Judge to reduce the sentence of imprisonment to only one day is clearly erroneous. The sentence is manifestly inadequate and evidently is not reflective of the gravity of the offence committed by the second appellant. We therefore set aside the High Court's decision on sentence and, as prayed by the prosecution, reinstate the sentence imposed by the Sessions Court. The prosecution's appeal is allowed. As regards the first appellant, we are satisfied that both the trial judge and the High Court had applied the correct principles and considered relevant factors in sentencing the first appellant and affirming such sentence respectively. We find no cogent reasons that would justify a conclusion that they had proceeded on wrong principles in assessing appropriate sentence. The sentence is not manifestly excessive. Accordingly, we affirm the sentence imposed by the Sessions Court on the first appellant. The appeal by the first appellant against sentence is dismissed.